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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

NELLIE ROSCO, an individual, and as Guardian ad Litem for MATT WATKINS and BILLY WATKINS and MICHAEL ROSCO, an individual,
Petitioners,

VS.

COUNTY OF LOS ANGELES, a Public Entity; DAVID WENZEL, an individual; ROBERT CHAFEE, an individual; WILLIAM YEO, an individual,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

Attorney of Record:
FRED M. BLUM

JAFFE, TRUTANICH, SCATENA & BLUM
151 Union Street
Suite 501
San Francisco, California 94111
Telephone: (415) 397-9006

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED FOR REVIEW

1. Is a social worker who conducts a pre-filing investigation of child abuse charges, which is intentionally and maliciously false and fraudulent, absolutely immune from liability under Title 42 U.S.C. § 1983, if that social worker does not determine whether dependency charges are to be brought?

2. Did Petitioners properly plead a cause of action against Respondent, County of Los Angeles, and if not, was it improper for the Court of Appeal to refuse to allow Appellant the opportunity to amend its complaint to properly plead the requirements?

PARTIES

The parties to the proceeding below are those listed in the caption; although Defendant Sandra Rosco is not a party to this Writ.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

OPINION BELOW

The initial judgment of dismissal was accompanied by a minute order, issued by Judge Miriam Vogel of the Los Angeles Superior Court. Clerk's Transcript (C.T.) 325-326. The California Court of Appeal on January 16, 1989 (Case No. 2 Civ. B031446), affirmed the dismissal of the action against Respondents. A copy of the decision appears in Appendix A hereto. A Petition for Review was timely filed in the California Supreme Court by Petitioners on March 7, 1989. On April 20, 1989, the California Supreme Court denied the Petition for Review of the Appellate Court ruling and also decertified the opinion pursuant to California Constitution Article VI, § 14; Rule 976, California Rules of Court. A copy of the decision appears in Appendix B hereto.

JURISDICTIONAL GROUNDS

The decision sought to be reviewed was issued by the California Court of Appeal on January 16, 1989, affirming the dismissal of the action against Respondents. A Petition for Review was timely filed in the California Supreme Court by Petitioners on March 7, 1989. On April 20, 1989, the California Supreme Court denied the Petition for Review of the Appellate Court ruling and also decertified the opinion pursuant to California Constitution Article VI, § 14; Rule 976, California Rules of Court. Jurisdiction is proper in this Court pursuant to Title 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED HEREIN

The sole statutory provision involved herein is Title 42 U.S.C. § 1983. Section 1983 states:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to a deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF CASE

Appellants filed this action after Respondents, at the instigation and with the aid of Michael Rosco's ("Michael") ex-wife, Sandra Rosco ("Sandra"), conducted an intentionally and maliciously false investigation into charges that Michael had allowed his stepsons, Matt and Billy Watkins ("Matt" and "Billy"), to sexually molest Michael's daughter, Gabriella. The investigation resulted in an unsuccessful dependency court proceeding being brought against Appellants.

On June 10, 1987, Appellants filed their Second Amended Complaint with the Los Angeles Superior Court. The gravamen of the complaint was that Respondents agreed and conspired among themselves to proceed with a course of conduct with the

intent to deprive Petitioner Michael of his constitutional right to take part in the upbringing and care of his baby girl, Gabriella. C.T. 4.[1]

The Complaint alleged that Defendant Sandra, due to the dissolution of her marriage to Michael, began a campaign to deny Michael any visitation or contact with their daughter Gabriella; to otherwise deny him his parental rights; and to impugn Appellants' reputation by alleging that they were either child molesters or persons who allowed child molestation to occur. C.T. 4-5. In order to carry out her plan, Defendant Sandra enlisted the aid of employees of Respondents' Department of Children's Services ("DCS"). C.T. 5. Specifically, Respondent David Wenzell ("Wenzell"), with knowledge of Defendant Sandra's true intent and knowing there was no evidence to connect Michael to any acts of sexual molestation, began an investigation to prove that Appellant Michael had sexually molested Gabriella. C.T. 5. Wenzell made a decision to attempt to gain such evidence by alleging that Michael's stepsons, Matt and Billy, molested Gabriella (C.T. 7) and to use these allegations as a lever against Michael in order to implicate him in acts of molestation. C.T. 7.

It was further alleged that Wenzell conducted his investigation in a false and misleading manner. Wenzell, along with other Respondents, cajoled and coerced Gabriella into falsely admitting that she had been molested. C.T. 5. Respondents knowingly admitted false reports concerning evidence derived as a part of the investigation, purposely ignored all exonerating evidence, and relied upon medical and other data which Respondents knew were scientifically unreliable. C.T. 5.

After the investigative report was submitted, a juvenile petition was filed against Matt and Billy for sexual molestation, and against Michael for allowing the molestation to occur. C.T. 5-6. The charges later were dismissed by the Juvenile Court. C.T. 6.

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[1] Under California law, since this appeal came before the Court of Appeal from the trial court's dismissal of the complaint on demurrer, the Appellate Court had to assume that the facts alleged therein were true. *Molien v. Kaiser Foundation* (1980) 27 Cal.3d 916.

The complaint alleges that Respondent County is liable for the above conduct since it inadequately trained, retained, hired and supervised the individually named Respondents, and that such training was a proximate cause of the injury. C.T. 9. Further, Appellants allege that it was the custom, policy and practice of Respondent County to conduct investigations of the molestation charges in the manner alleged. C.T. 8.

A Demurrer to Petitioner's Second Amended Complaint was filed on July 22, 1987. C.T. 18-21. Petitioner filed its opposition on August 25, 1987. C.T. 241-289. On November 3, 1987, Respondents' Demurrer was heard, with the Honorable Judge Miriam Vogel presiding.

Judge Vogel granted the Demurrer, on the sole basis that under controlling federal law, specifically *Cleavinger v. Saxner* (1985) 474 U.S. 193 and *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir. 1987), both the municipal and individual defendants were absolutely immune from liability. C.T. 325-326. The action was then dismissed by the court. Reporters Transcript (R.T.) 11-12. Petitioners then filed a timely appeal.[2] C.T. 327-329.

Petitioners' appeal was heard, and on January 26, 1989, the Court of Appeal for the Second Appellate District, Division Two, issued its opinion. The dismissal was affirmed as it relates to the individual defendants on the ground that they were absolutely immune from liability, and as to the County defendant on the ground that liability against the County had been improperly pled.

As it related to the individual immunity issue, the court stressed that it is the role of the social worker under the California statutory scheme both to investigate charges of child abuse and to file dependency court petitions. *Slip op.* at pp. 11-13. Thus, the court concluded that there was a sufficient connection between the two in order to make both functions absolutely immune from civil liability for damage suits. The court stated:

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[2] Petitioners appealed only from the dismissal of the first cause of action based upon Title 42 U.S.C. § 1983.

> We think it clear that the alleged misdeeds of the individual defendants—issuing false and misleading reports, coercing untrue statements from a witness, drawing unsupported conclusions, and ignoring exculpatory evidence—if committed, arose while defendants were performing a function so intimately related to the judicial phase of the dependency hearing as to warrant absolute immunity.

Slip op. at p. 13 (Citations omitted). The opinion of the Court of Appeal affirming the dismissal was certified for publication.

On March 7, 1989, Petitioners filed a Petition for Review with the California Supreme Court. On April 20, 1989, the California Supreme Court issued an order denying the Petition for Review, but also directed that the opinion of the Appellate Court not be published.

REASONS FOR GRANTING THE WRIT

I

THE CIRCUIT COURTS ARE SPLIT ON THE EXISTENCE AND EXTENT OF THE IMMUNITY WHICH SOCIAL WORKERS HAVE AS IT RELATES TO THE INVESTIGATION AND BRINGING OF CHILD ABUSE CHARGES AGAINST PARENTS

In the last several years, Federal courts have been asked to determine the existence and scope of immunity afforded state social workers under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (the Act) for the investigation and bringing of charges of parental sexual abuse of children. This task has forced the courts to delve into the sensitive area of human sexuality and to reconcile important, but often conflicting, interests of the child and the parent.

Petitioner is mindful that a state has a compelling interest in protecting children from parents who abuse them. However, the state's compelling interest must be weighed against this Court's long line of decisions which uphold the constitutional right of a parent to participate in the upbringing of his or her children. As early as 1923 in *Meyer v. Nebraska* (1923) 262 U.S. 390, this

Court found that the "liberty" interest guaranteed by the Fourteenth Amendment "without doubt . . . denoted . . . the right of the individual . . . to marry, establish a home and bring up children." *Id.* at p. 399. Similarly, in *Pierce v. Society of Sisters* (1925) 268 U.S. 510, this Court affirmed the enjoining of an Oregon statute which was deemed to interfere "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at pp. 534-535. In *Prince v. Massachusetts* (1944) 321 U.S. 158, this Court noted that

> It is cardinal with us that the custody, care or nurturing of the child resides first in the parents, whose primary function of freedom includes preparation for obligations the state can neither supply nor hinder . . . and it is the recognition of this that these decisions [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter.

Id. at p. 166.[3]

The central question presented in this Petition is the level of redress afforded an individual when a malicious and bad faith investigation by a state social worker results in a violation of an individual's right to parent. Each court that has reviewed this question has found that at a minimum the social worker should be afforded a qualified immunity for the performance of these functions. It is on the issue of the application of absolute immunity that the circuits diverge.[4]

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[3] In *Bohn v. County of Dakota*, 777 F.2d 1433 (8th Cir. 1985), Cert.Den. 475 U.S. 1014, the 8th Circuit found that false allegations of child abuse attach a "badge of infamy" to the citizen and thus bring due process considerations into play. *Id.* at p. 1436 n.4. The 8th Circuit found that child abuse allegations drive "a wedge into the family and threaten its very foundation." *Id.* "The stigma . . . suffered as a reported child abuser undoubtedly . . . [erodes] the family solidarity, [and] eternally . . . [impairs] the family's ability to function in the community." *Id.*

[4] The issue of immunity is complicated by the broad powers granted to social workers under state law. The relevant stages as they relate hereto are the investigatory stage, removal of children from the home prior to the filing of court proceedings and the initiation of the court

A. The Second, Fifth and Tenth Circuits Have Generally Applied a Qualified Immunity Test

The Second, Fifth and Tenth Circuits have found only a qualified immunity applies to the investigatory stages. These Circuits in finding that only a qualified immunity applies to a social worker have premised their conclusion upon their finding that the acts of the social worker in question are functionally equivalent to that of a police officer. *Spielman v. Madsen*, No. 87-1098 (10th Cir. May 3, 1989); *Robison v. Via*, 821 F.2d 913, 919-920 (2nd Cir. 1987); *Austin v. Borel*, 830 F.2d 1356 (5th Cir. 1987), *rehearing den.*, 836 F.2d 1346.

In *Robison*, the Second Circuit was asked to determine the scope of immunity afforded a Vermont State Trooper and Assistant State Attorney who took children into custody in order to investigate abuse reports.[5] The relevant conduct of defendants in *Robison* took place prior to the time that any judicial officer had been contacted and requested to grant an order allowing the removal of the children. The trial court characterized the defendants' conduct as investigative rather than prosecutorial. *Id.* at p. 917. Based upon this characterization, when Defendants brought a summary judgment requesting dismissal on the ground that their acts were absolutely immune, the court denied the motion. The Defendants appealed therefrom, and the Second Circuit affirmed the denial of the summary judgment.

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proceedings. The stage of the proceedings has been an important criterion in determining what level of immunity applies. For instance, the 9th Circuit Court of Appeals in *Meyers v. Contra Costa County Department of Social Services*, 812 F.2d 1154 (9th Cir. 1987), Cert.Den. ____ U.S. ____, 108 S.Ct. 98 found that absolute immunity applied to the filing of the juvenile petition but only a qualified immunity to the pre-petition removal of the children from the home.

[5] The fact that there was not a social worker involved in *Robison*, but a state trooper and assistant state attorney is irrelevant since this Court has repeatedly stated that it is the function of the official and not his title which is the crucial factor in determining what level of immunity applies. *Forrester v. White* (1988) ____ U.S. ____, 108 S.Ct. 538.

The linchpin of the decision by the Second Circuit was that the actions of Defendants in seizing the child prior to any court authorization was functionally equivalent "to a police officer's applying for a pre-proceeding arrest warrant. . . ." *Id.* at p. 918.[6] Since this Court in *Malley v. Briggs* (1986) 475 U.S. 335 found that an officer performing such a function was not "a central actor in the judicial process" and therefore not entitled to absolute immunity, the Second Circuit found that the defendants were also not entitled to such an immunity.

The Second Circuit also rejected defendant's arguments that the act of seizing the child was akin to the performance of a prosecutorial function. The Second Circuit stressed that at the time of the seizure "no proceedings had yet been commenced, and it does not appear that Via was in a position at that moment to commence a prosecution of a child abuse claim." *Robison, supra*, at p. 919. Thus, the court concluded "that taking the children was part of the preliminary investigatory process. . . ." *Id.*

The Fifth Circuit in *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir. 1988) and *Austin v. Borel, supra*, found, like the Second Circuit, that the removal of its child from the home of its parents without a prior court order was not protected by absolute immunity, and additionally, that under the procedural requirements of Louisiana law, the filing of a false verified complaint seeking removal of children from the custody of their parents was also not protected by an absolute immunity.

In *Austin*, after defendant presented to the county attorney his results of an investigation into child abuse charges, the county attorney initiated a dependency proceeding in the state court. Attached to the petition for removal was a verified complaint, signed by the defendant's social worker and itemizing the results

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[6] The California Appellate Court sought to distinguish the *Robison* type cases by pointing out that there was no allegation that Petitioner Michael's child had been seized by DCS. Slip op. at 10. However, in attempting to make this distinction the court missed the point. The *Robison* court found that only a qualified immunity applied because the seizure was a police-like function. So is the investigation of suspected wrongdoing.

of the investigation. Plaintiff alleged that the investigation conducted by defendant and reported in the verified complaint was maliciously false. Based upon the malicious investigation the children were removed from their home, although they were later returned after a formal hearing.

The Fifth Circuit, in finding that the conduct of the social worker did not rise to a level warranting the application of absolute immunity, focused upon the role of the verified complaint in the Louisiana Juvenile Dependency Scheme. The court found that once the petition with the verified complaint was filed, the juvenile court, upon receiving the petition and the complaint, decided the course of conduct to proceed upon, whether it be removal or non-removal. The court analogized this conduct to that of the police officers in *Malley*, and found no logical distinction between the conduct of the social worker and that of a police officer who requests an arrest warrant. Since both act as a complaining witness, and since complaining witnesses were not afforded absolute immunity at common law, the social worker was not entitled to such an immunity. *Id.* at pp. 1361-1362.

In *Spielman*, the Tenth Circuit was confronted with the level of immunity to be afforded a social worker when it is alleged that the social worker removed the child from a home without proper procedural due process protections.[7] Defendants sought to have the complaint dismissed, partially on the ground that their conduct of removing the child prior to a hearing was absolutely immune from suits for civil damages.

The Tenth Circuit, in finding that absolute immunity did not apply, concentrated on whether the conduct of the defendants was more akin to that of a prosecutor or to that of a police officer. Relying upon the Fifth Circuit's decisions in *Hodorowski* and *Austin*, the court found that there was no meaningful similarity between the prosecutorial functions of a prosecutor and the conduct of defendants. Therefore, qualified immunity, rather than absolute immunity, applied to defendants' conduct.

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[7] A collateral issue in the *Spielman* case was whether the plaintiffs who were the pre-adoptive parents of the children had alleged a deprivation of federal rights.

B. The Sixth and Ninth Circuits Have Applied Absolute Immunity

Those courts which have extended absolute immunity to a substantial part of the practices of social workers are the Sixth Circuit in *Salyer v. Patrick*, No. 88-5377 (6th Cir. January 31, 1989) and *Kurzawa v. Mueller*, 732 F.2d 1546 (6th Cir. 1984), and the Ninth Circuit in *Coverdell v. Department of Social and Health Services, State of Washington*, 834 F.2d 758 (9th Cir. 1987) and in *Meyers, supra.* The common link in all these cases is that in finding absolute immunity the courts focused upon the act of the social worker in filing the dependency court proceeding, and found that such act was the functional equivalent of a prosecutor filing a criminal action. Thus, since the Supreme Court in *Imbler v. Pachtman* (1976) 425 U.S. 409, found that the filing function of the prosecutor deserved absolute immunity from liability, the social worker is entitled to such immunity. However, even these courts are split as to the extent of the immunity, and while they either explicitly or implicitly disagree with the decision of the Fifth Circuit in *Austin*, there has not been universal acceptance of the application of absolute immunity for all phases of the social worker's conduct. See footnote 4, *supra.*

In *Kurzawa*, the Sixth Circuit granted absolute immunity to social workers for the initiation of child neglect proceedings by the filing of a petition in state court. The court reasoned that those who filed the petitions "to protect the health and well being of the children . . . must be able to perform the necessary task to achieve this goal without the worry of intimidation and harassment from dissatisfied parents." *Id.* at p. 1458.

The *Kurzawa* decision was followed several years later by the Sixth Circuit's decision in *Salyer.* The *Salyer* court found that a social worker who filed a juvenile court petition without adequately investigating the report was absolutely immune from liability, but was not able to reach the same decision as it related to the investigatory phase. The court refused to decide whether social workers were "entitled to absolute immunity for initiating an investigation, or for attempting to investigate . . ." charges of abuse.

In *Meyers v. Contra Costa County Department of Social Services, supra*, the Ninth Circuit Court of Appeals found that the conduct of social workers in initiating a dependency court proceeding was entitled to absolute immunity. On the other hand, the *Meyers* court found that the pre-filing conduct of the social workers, such as the removal of children from the home, was entitled only to a qualified immunity. The California courts utilized the *Meyers* decision in sustaining the demurrer and dismissing the instant case. However, a review of *Meyers* demonstrates that the case should have been utilized to overrule the demurrer.

In *Meyers*, plaintiffs alleged that defendant Haaland, a social worker, deprived them of their civil rights by illegally seizing their children. Specifically, the complaint alleged three separate actions on the part of Haaland which plaintiffs believed were in violation of the Act. They were: (1) ordering plaintiff to stay away from his home until after a judicial hearing; (2) filing a judicial dependency petition; and (3) giving perjured testimony at the dependency hearing. The Ninth Circuit held that the latter two contentions of plaintiffs were subject to an absolute immunity bar; however, the first contention, that Haaland order plaintiff to stay away from his home, was not subject to absolute immunity.

The crucial distinction between the first and last two contentions was that the first contention related to conduct by Haaland which took place *prior* to the time the judicial proceedings were instigated and thus was not an integral part of the judicial process. *Id.* at p. 1157. The *Meyers* court emphatically stated that:

> [W]e hold, first, that Haaland is entitled to absolute immunity for all of his actions *except those which preceded the initiation of judicial proceedings and as to those actions, qualified immunity applies.* . . .

Id. at p. 1155 (emphasis added).

The *Meyers* court first dealt with the issue of whether Haaland was immune from liability due to his alleged perjured testimony. The court quickly found that absolute immunity applied, due to the clear Supreme Court precedent and its historical antecedents

relating to absolute immunity given to witnesses. *Id.* at p. 1156 (relying on *Briscoe v. LaHue* (1983) 460 U.S. 325).

The court then went on to discuss whether Haaland deserved absolute immunity for the initiation of the dependency hearing. The court first found that the action of Haaland in initiating the juvenile proceeding was "not very different from the responsibility of a criminal prosecutor." *Id.* at p. 1157. Once this analogy was made, the functional analysis compelled the court to find that since a prosecutor is immune, a social worker must also be immune. *Id.*

The court then went on to discuss the type of immunity that applied to the conduct of Haaland when he ordered plaintiff to stay away from his home. The court found that prosecutorial immunity did not apply because the conduct of Haaland could not "be characterized . . . as advocatory or quasi-judicial." *Id.* The key to the court's holding was that the conduct of Haaland took place prior to the initiation of the judicial proceeding. The court found that "[r]ather than contributing to an informed judgment by an impartial decision-maker as an advocate, Haaland acted unilaterally prior to the operation of the judicial process." *Id.*

The diversity of views expressed by the different districts relating to the scope and existence of immunity for persons performing a task of investigating and initiating child abuse charges, demands a review of these facts by this Court.

II

THE DECISION OF THE CALIFORNIA COURT OF APPEAL PERVERTS THE FUNCTIONAL ANALYSIS MANDATED BY THIS COURT

The Appellate Court, in affirming the dismissal refused to look at the specific allegations made against the individual Defendants and instead chose to look at the role of the social workers in initiating the dependency court proceedings. *See Slip op.* at pp. 10-12. The court found that since under appropriate state law (Welfare and Institutions Code § 325), social workers were obligated to file dependency court proceedings, and that since the

investigation conducted by the individual defendants had a bearing on whether or not the proceeding was to be filed, the actions of the investigative social workers were "a function so intimately related to the judicial process of the dependency hearing as to warrant absolute immunity." *Id.* at p. 13.

The mistake which the California court made was not focusing on the individual function performed by the individual defendant, but looking at the functions of social workers as a whole. This type of analysis was recently rejected by this Court in the case of *Forrester v. White* (1988) ____ U.S. ____, 108 S.Ct. 538, wherein the court applying the functional test, held that judges who enjoy an absolute immunity for their judicial acts do not have such an immunity for the administrative act of hiring and firing employees. *Id.* at p. 545.

The danger of the Appellate Court ruling can be seen in a review of the court's decision in *Malley v. Briggs* (1986) 475 U.S. 335, when the Appellate Court's analysis is applied to it. In *Malley*, this Court found that a police officer who requests an arrest warrant is not entitled to absolute immunity for the performance of that act. The court further found that the fact that the action of the police officer resulted in a criminal filing was not relevant to the analysis, but related only to the question of damages. A police officer who improperly sought an arrest warrant, was liable for all damages causally connected to said act, including the resulting arrest. *Id.* at p. 344 n.7.

Under the analysis applied by the California court, if the title of the police officer were changed to district attorney investigator, then the investigator performing the same act as the police officer would be entitled to an absolute immunity since the district attorney's office, which he worked for, had such an immunity for the filing of the criminal case. Such a result is absurd, but it is a logical extension of the Appellate Court ruling.

For this reason, this Court should grant this Writ in order to assure that its functional analysis mandate is carried out.

III

APPELLANTS ADEQUATELY ALLEGE LIABILITY AS IT RELATES TO RESPONDENT COUNTY OF LOS ANGELES

The Appellate Court, in affirming the dismissal as it related to Respondent County, did so based upon its conclusion that the allegations against Respondent County were conclusionary. In focusing upon this issue, it is important to note that the Appellate Court's analysis of the pleadings was the *first* time that any court had made a determination as to the sufficiency of the pleadings. The first two demurrers were granted by the trial court not on the basis of the allegations of liability, but solely upon the court's finding of absolute immunity for both the individual and County Defendants. Even assuming that the court was correct, this Court should either grant review, or remand with instructions to allow Appellant the opportunity to amend its complaint, based upon the following analysis.

A. The Court Erred In Not Allowing Appellant To Amend Its Complaint

The language of the Act, and the legislative history, make it unquestionably clear that the Act is remedial in nature and must be given "an expansive sweep." *Owen v. City of Independence* (1980) 445 U.S. 622, 635. As such, a civil rights complaint "will survive dismissal 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which will entitle him to relief' ". *Batisda v. Rodriguez*, 702 F.2d 393 (2d Cir. 1983) (quoting *Conley v. Gibson* (1957) 355 U.S. 41, 45-46).

In this case, it cannot be said "beyond doubt" that the complaint cannot be amended in order to allege the facts necessary to support the pleading. While it *may* be true that the allegations relating to custom and practice were conclusionary, all that would be necessary in order to solve the problem would be to allow Appellant to plead those facts which support the conclusion. In light of the fact that the Appellate Court's review of the pleadings was the first review taken by a court, allowing an amendment would not only be proper, but would be within the express intent of the Act.

B. The Court Should Remand This Case With Instructions To The Appellate Court To Review Its Decision In Light Of the United States Supreme Court's Recent Decision in *City of Canton v. Harris*, No. 86-1088 (February 28, 1989)

The Appellate Court, in reaching its conclusion, did not discuss the allegations in the Complaint relating to the inadequate training and supervision of Appellant. In *Canton v. Harris*, No. 86-1088 (February 28, 1989), this Court for the first time discussed the issues of inadequate training as they relate to municipal liability under the Act. The Court found that municipalities can be liable where a " 'deliberate indifference' to the rights of its inhabitants . . ." causes the deprivation.

While Appellant did not use the buzz words "deliberate indifference" in its complaint, it did allege that

> [p]ursuant to said policies, customs, practices, and usage of Defendant LOS ANGELES, the individually named Defendants were recklessly and/or intentionally trained and supervised in the conducting of investigations in the molestation allegations, and failed to establish sufficient internal discipline and controls, and as a result of inadequate and reckless training, the wrongs as herein alleged occurred.

C.T. 9.

Such allegations of intentional conduct unquestionably rise to a level of deliberate indifference, and thus, had the Appellate Court had the *Canton* decision available to deal with, it should have ruled that there was sufficient pleading of custom as it relates to Respondent County.

CONCLUSION

The disposition of this case presents the opportunity for this Court to create uniformity of rulemaking between the different circuits. Furthermore, the granting of the Writ is necessary in order for the Court to ensure that the functional analysis mandated for § 1983 analysis under *Forrester, supra*, is actually carried out by state courts.

Dated: July 20, 1989

Respectfully submitted,

JAFFE, TRUTANICH, SCATENA & BLUM

By: FRED M. BLUM
Attorneys for Appellants

(APPENDICES FOLLOW)

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

No. B031446
(Super. Ct. No. C613534)

NELLIE ROSCO, individually, and as Guardian ad Litem for MATT WATKINS and BILLY WATKINS and MICHAEL ROSCO, an individual,
Plaintiffs and Appellants,

vs.

COUNTY OF LOS ANGELES, a Public Entity; DAVID WENZEL, an individual; ROBERT CHAFFEE, an individual; WILLIAM YEO, an individual; and DOES 1 through 100, inclusive,
Defendants and Respondents.

[Filed Jan. 26, 1989]

APPEAL from a judgment of the Superior Court of Los Angeles County. Miriam Vogel, Judge. Affirmed.

Jaffee, Trutanich, Scatena & Blum, and Fred M. Blum, for Plaintiffs and Appellants.

Wasserman, Comden & Casselman, Edward A. DeBuys and Richard D. Lester, for Defendants and Respondents.

Plaintiffs, Michael Rosco, his present wife, Nellie, and her two children, Matt and Billy Watkins, appeal from a judgment of dismissal entered after the trial court sustained, without leave to amend, a demurrer to their second amended complaint against defendants County of Los Angeles (county), et al. The complaint alleged that plaintiffs suffered damages arising out of the miscon-

duct of employees of county's Department of Childrens Services (DCS) in violation of both state and federal law.

Plaintiffs appeal, however, only from the dismissal of their civil rights action premised on 42 United States Code Section 1983 (hereinafter section 1983) which provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

In the instant case, plaintiffs charged that defendants violated their parental, privacy and due process rights, denied them equal protection of law, and damaged their reputation by attaching to them "a badge of infamy" as a result of the manner in which defendants conducted an investigation into charges of child abuse and molestation.

The trial court dismissed the action after ruling that defendants possessed prosecutorial immunity to actions commenced under the federal statute.[1] We affirm.

Plaintiffs' complaint alleged the following facts. Michael and his former wife Sandra had a child named Gabriella. Following their marital dissolution, Sandra formulated a plan to impugn Michael's reputation and deprive him of his parental rights as to Gabriella. To accomplish her purpose, she made a false report to one David Wenzel, an employee of DCS, charging that Michael had permitted his stepsons, Matt and Billy, to sexually molest Gabriella.[2] Plaintiffs complained that Sandra then enlisted the aid

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[1] The trial court also sustained a general demurrer to the causes of action commenced under various state theories. The court found that those counts were barred by immunities and privileges afforded pursuant to state law.

[2] Plaintiffs named Sandra as a defendant; however, she is not a party to this appeal.

of Wenzel, and his supervisors, Robert Chaffee and William Yeo, to further her deception.

According to the pleading, the DCS employees knowingly aided Sandra's "scheme by making false and misleading reports, cajoling and coercing Gabriella into falsely admitting that said molestation had taken place; making statements and conclusions regarding the physical condition of Gabriella without any scientific, medical or other justification for the making of said false statements; by ignoring evidence which would have the effect of exonerating Plaintiffs [Matt and Billy]; and by conducting a biased, inadequate and reckless investigation into the facts of the instant case. [¶] As a result of the acts as hereinabove alleged . . . a Petition was filed in [juvenile court] alleging that Plaintiff Michael Rosco's parental rights should be eliminated or limited due to the fact that [Matt and Billy] had sexually molested Gabriella and that Plaintiff Michael Rosco had not adequately supervised Gabriella. . . . [¶] The charges in the Petition . . . were dismissed."

Plaintiffs further alleged that "[t]he investigation into the conduct of [Matt and Billy] was a pretext to allow Defendants to investigate the conduct of Plaintiff Michael Rosco. . . . [I]t was the intent of Defendants to utilize the investigation into [Matt and Billy] as a means to disrupt the parental relationship between Gabriella and Plaintiff Michael Rosco, and to attempt to acquire evidence that Plaintiff Michael Rosco mistreated Gabriella."

The complaint also charged that the county "inadequately train[ed] its personnel to conduct its investigations, . . . allow[ed] investigators to conduct their investigation in a reckless manner . . . [and] to falsify evidence, and to ignore exonerating evidence. . . ." As a proximate result of the aforementioned conduct, plaintiffs alleged that they suffered medical and legal costs, emotional distress, and lost wages.

We begin our analysis by first addressing the liability of the individual defendants. It is axiomatic that on appeal from the granting of a demurrer, the reviewing court must treat as true the properly pleaded allegations contained in plaintiffs' complaint. (*Loehr v. Ventura County Community College Dist.* (1983) 147

Cal.App.3d 1071, 1076.) Nevertheless, even if plaintiffs could prove their charge that the DCS employees conspired[3] to and did conduct themselves illegally during the investigation, no liability would attach to the individual defendants if their actions were "intimately associated with the judicial phase of the [dependency proceeding] . . . to which the reasons for absolute immunity apply with full force." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 430; see also *Whelehan v. County of Monroe* (W.D.N.Y. 1983) 558 F.Supp. 1093, 1100-1101; *Donald M v. Matava* (D. Mass.1987) 668 F.Supp. 703, 712.)

The availability of immunity in actions under section 1983 is governed by federal law. (*Martinez v. California* (1980) 444 U.S. 277, 284.) The courts have recognized two forms of immunity in this area. "Qualified immunity shields only that conduct not violative of clearly established constitutional rights of which a reasonable person would have known. Absolute immunity, in contrast, precludes any action for damages, so long as the challenged conduct falls within the scope of the immunity." (*Austin v. Borel* (5th Cir.1987) 830 F.2d 1356, 1358, fn. omitted.)

In *Imbler v. Pachtman, supra*, 424 U.S. 409, the United States Supreme Court held that prosecutors enjoy absolute immunity to section 1983 lawsuits because "[a] prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would sufffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. . . . Further, if the prosecutor could be made to answer in court each time . . . a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. . . . Frequently

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[3] By necessity, plaintiffs must allege that Chaffee and Yeo conspired with Wenzel in order to state a section 1983 action against them. Supervisory personnel cannot be held liable under the doctrine of respondeat superior. (*Myers v. Morris* (8th Cir.1987) 810 F.2d 1437, 1464; *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658; *Hennessey v. State of Wash., Dept. of Social and Health Services* (E.D.Wash. 1985) 627 F.Supp. 137, 140-141.)

acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decision, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." (*Id.* at 424-426.)

In *Butz v. Economou* (1978) 438 U.S. 478, the Supreme Court extended absolute immunity to executive branch officials authorized to initiate and conduct administrative hearings. The Court emphasized that the existence of immunity depended not on the government official's status, but on his or her function. (*Id.* at pp. 551-512.) Applying the functional test, three circuits of the United States Court of Appeals, have held that where social workers in child dependency cases serve a quasi-judicial role, they should be afforded absolute immunity. (*Meyers v. Contra Costa County Dept. of Soc. Serv.* (9th Cir.1987) 812 F.2d 1154, 1156; *Malachowski v. City of Keene* (1986) 787 F.2d 704, 712; *Kurzawa v. Mueller* (6th Cir.1984) 732 F.2d 1456, 1458; see also federal district court decisions in *Mazor v. Shelton* (N.D.Cal.1986) 637 F.Supp. 330, 335; *Fogle v. Benton County SCAN* (W.D.Ark. 1987) 665 F.Supp. 729, 733-734; *Pepper v. Alexander* (D.N.M. 1984) 599 F.Supp. 523, 526-527; *Whelehan v. County of Monroe, supra,* 558 F.Supp. 1093, 1098-1099.)

In *Meyers,* the court of appeals for the Ninth Circuit recognized that "[a]lthough child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different from the responsibility of a criminal prosecutor." (*Meyers v. Contra Costa County Dept. of Soc. Serv., supra,* 812 F.2d 1154, 1157.)

Plaintiffs attempt to distinguish the instant litigation from the aforementioned line of decisions by arguing that their federal action is not based on the *initiation* of the dependency hearing. Instead, they vigorously contend that defendants are entitled only to qualified immunity because the alleged deprivation of rights occurred during the *investigative* phase preceding initiation of the dependency proceeding.

Plaintiffs rely strongly on *Austin v. Borel, supra*, 830 F.2d 1356. There, the court of appeals for the Fifth Circuit denied absolute immunity to Louisiana state child protection workers in a civil rights action which alleged that they filed a false verified complaint seeking the removal of two sisters from their parents. Under Louisiana law, the presentation of a verified complaint authorized the "juvenile court . . . [to] issue an instanter order directing the child's removal from its parents' custody." (*Id.* at p. 1361.) However, "[i]ssuance of an instanter order upon the filing of a verified complaint initiat[ed] custody, but only filing the petition itself initiates the adjudication process." (*Ibid*, fns. omitted.) The court analogized the role of the social worker to that of a probation officer who mistakenly causes the arrest of a probationer. The *Austin* court stated: "[A] parole officer performs a function closely analogous to that of a police officer filing an affidavit seeking a warrant to arrest. Since the parole officer's actions in this regard are functionally comparable to those of a police officer, he is only entitled to qualified immunity."[4] (*Austin v. Borel, supra*, 830 F.2d at p. 1362.)

In *Hodorowski v. Ray* (5th.Cir.1988) 844 F.2d 1210, the court held that Texas social workers, who temporarily removed children from their parents under state law without a prior court order, were entitled to only qualified immunity. "[S]eizure without a court order in the face of an immediate danger seems to us more

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[4] In deciding claims of immunity, the Supreme Court begins its analysis by determining "whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. [Citation.] If 'an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.' " (*Malley v. Briggs* (1986) 475 U.S. 335, 339-340.) In *Malley*, a police officer argued that he should be accorded absolute immunity under section 1983 for allegedly seeking an illegal arrest warrant. He argued that his function was similar to that served by a complaining witness. The Court rejected the argument on the ground that in 1871 the common law only afforded complaining witnesses limited immunity. (*Id.* at pp. 340-341.)

akin to the function of police than prosecutors." (*Id.* at p. 1214; see also *Robison v. Via* (2d.Cir.1987) 821 F.2d 913, 918-919.) Also in *Meyers v. Contra Costa County Dept. of Soc. Serv., supra*, 812 F.2d 1154, 1157, the court extended only qualified immunity to a social worker who allegedly violated the rights of a father by illegally ordering him to vacate his home. (But see *Mazor v. Shelton, supra*, 637 F.Supp. 330; *Whelehan v. County of Monroe, supra*, 558 F.Supp. 1093; and *Hennessey v. State of Washington, Dept. of Social and Health Services, supra*, 627 F.Supp. 137, all holding that social workers were absolutely immune to section 1983 actions based on the removal of children from their homes without prior court approval.)

Here, there is no contention that defendants made any arrests, removed the child from the home or in any manner impaired the liberty or restricted the movements of anyone. The complaint alleges nothing more than investigative activity consisting primarily of questioning the child and her mother.

Plaintiffs cite us to *Barbera v. Smith* (2d Cir. 1987) 836 F.2d 96. There, the court of appeals stated: "As we see it, the prelitigation function that a prosecutor performs has at least two aspects: (1) the supervision of and interaction with law enforcement agencies in *acquiring* evidence which might be used in a prosecution, and (2) the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order. While both of these categories of activities occur before the commencement of formal legal proceedings, and therefore may be loosely termed 'investigative,' we believe that the first category consists of actions that are of a police nature and are not entitled to absolute protection, [citations]." (*Id.* at p. 100, emphasis in original.)

In California, the evaluation and institution of dependency proceedings aimed at protecting children from physical and sexual abuse are uniquely the function of the probation officer whose activities are not nearly as diverse as that of the district attorney.

At the time defendants initiated the dependency proceeding, Welfare and Institutions Code section 300 declared that any person under the age of 18 years may be adjudged a dependent

child of the juvenile court if his or her "home is an unfit place . . . by reason of neglect, cruelty, depravity, or physical abuse. . . ." (Welf. & Inst. Code, § 300, subd. (d).) The code also commands that whenever a person lodges an affidavit alleging that a minor is a sexually abused child, the "probation officer shall *immediately make such investigation as he deems necessary to determine whether proceedings in the juvenile court should be commenced.*" (Welf. & Inst. Code, § 329, emphasis added.)

State law specifically authorizes the probation officer to commence a dependency proceeding by filing a petition with the juvenile court. (Welf. & Inst. Code, § 325; Cal. Rules of Court, rule 1308, subd. (a)(1).)[5]

Moreover, the probation officer who files the petition "shall be the guardian ad litem to represent the interests of the minor in [dependency] proceedings" unless otherwise ordered by the court. (Welf. & Inst. Code, § 326.) And, except where waived, "the probation officer shall be present in court to represent the interests of each person who is the subject of a petition to declare that person to be a . . . dependent child upon all hearings or rehearings of his or her case, and *shall furnish to the court such information and assistance as the court may require.*" (Welf. & Inst. Code, § 280, emphasis added; see also Welf. & Inst. Code, § 281.)

The probation officer does not supervise or interact with police agencies in acquiring evidence. He or she organizes, marshalls and evaluates evidence all as a condition precedent to the commencement of a judicial proceeding and in so doing is exercising a function which equates with that of a prosecuting official.

Contrary to plaintiffs' contention, it matters not that the probation officer (in Los Angeles County, the head of the DCS) employs deputies who perform those various functions in his or her name or that the functions of organizing, marshalling and

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[5] Here, the Los Angeles County Board of Supervisors has delegated the statutory duties of the probation officer in regard to child abuse to the head of the DCS. (Los Angeles County Code, § 2.38.050; Welf. & Inst. Code, § 272.)

evaluating evidence and instituting judicial proceedings in any single case are performed by different individuals.

We think it clear that the alleged misdeeds of the individual defendants—issuing false and misleading reports, coercing untrue statements from a witness, drawing unsupported conclusions, and ignoring exculpatory evidence—if committed, arose while defendants were performing a function so intimately related to the judicial phase of the dependency hearing as to warrant absolute immunity. (*Whelehan v. County of Monroe, supra*, 558 F.Supp. 1093, 1100-1101; *Donald M v. Matava, supra*, 668 F.Supp. 703, 712.) Without absolute immunity to gather, analyze, preserve, organize, and evaluate evidence, social workers would be unduly hampered in their legislatively mandated duty to protect children from unfit homes through dependency proceedings. As the *Meyers* court noted: "The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. We therefore hold that the social workers are entitled to absolute immunity in performing social workers quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." (*Meyers v. Contra Costa County Dept. of Soc. Serv., supra*, 812 F.2d 1154, 1157.) Considering the unique role that the DCS employees play in investigating, initiating, and participating in dependency proceedings, any lesser degree of immunity could impair the judicial process itself. (Cf. *Malley v. Briggs, supra*, 475 U.S. 335, 343.) The investigation of which plaintiffs complain was within the scope of the DCS' "litigation-related duties." (*Barbera v. Smith, supra*, 836 F.2d 96, 100.)

Turning to the county's liability under section 1983, we hold as a matter of law that the allegations in the second amended complaint here are insufficient to support a civil rights action

against the county.[6] As stated in *Bouvia v. County of Los Angeles* (1987) 195 Cal.App.3d 1075, 1087: "In order to successfully maintain an action under [section 1983] against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. [Citations.]"

In the present case, plaintiffs alleged in a strictly conclusionary fashion that the county "knowingly and intentionally promulgated, maintained and enforced policies, customs, practices and usages . . . to allow investigators to conduct their investigation in a reckless manner, to allow investigators to falsify evidence, and to ignore exonerating evidence. . . . " These bare allegations simply do not rise to the level of factual specificity required in section 1983 actions. "Complaints relying on the civil rights statutes are plainly insufficient unless they contain some specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions." (*Koch v. Yunich* (2d Cir.1976) 533 F.2d 80, 85.) As the court in *Kauffman v. Moss* (3d Cir.1970) 420 F.2d 1270, 1276, fn. 15, stated: " 'In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous . . . ; they

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[6] The trial court's minute order reveals that the court also immunized the county from a section 1983 lawsuit. This was error. In *Owen v. City of Independence* (1980) 445 U.S. 622, 657, the United States Supreme Court held that local governments are not immune from damage liability under section 1983. (See also *Ybarra v. Reno Thunderbird Mobile Home Village* (9th Cir.1984) 723 F.2d 675, 681.)

Nevertheless, " '. . . [n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

all cause defendants—public officials, policeman and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation. . . .' "

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ COMPTON, Acting P.J.
Compton

We concur:

/s/ GATES, J.
Gates

/s/ FUKUTO, J.
Fukuto

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, No. B031446
S009239

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

NELLIE ROSCO, et al.

vs.

COUNTY OF LOS ANGELES, et al.

[Filed April 20, 1989]

Appellants' petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal, filed January 26, 1989, which appears at 207 Cal.App.3d 531. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

/s/ LUCAS
Chief Justice

Supreme Court, U.S.
FILED
SEP 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-142

In The

Supreme Court of the United States

October Term, 1989

NELLIE ROSCO, an individual, and as Guardian ad Litem for MATT WATKINS and BILLY WATKINS and MICHAEL ROSCO, an individual,

Petitioners,

vs.

COUNTY OF LOS ANGELES, a Public Entity; DAVID WENZEL, an individual; ROBERT CHAFEE, an individual; WILLIAM YEO, an individual,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

Attorney of Record:
DAVID B. CASSELMAN

WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd., Suite 330
Tarzana, California 91356
(818) 705-6800

Attorneys for Respondents, COUNTY OF LOS ANGELES, a Public Entity; DAVID WENZEL, an individual; ROBERT CHAFEE, an individual; and DOES 1 through 100, inclusive

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Does prosecutorial immunity protect social service workers from liability under 42 U.S.C. § 1983 for initiating child dependency actions and for conducting investigations necessary for the preparation of their case?

2. Can a municipality be held liable under 42 U.S.C. § 1983 in the absence of any allegation that its customs and policies violated petitioner's constitutional rights?

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STATEMENT OF CASE

Petitioner MICHAEL ROSCO was the father of a daughter GABRIELLA ROSCO by his previous marriage with defendant SANDRA ROSCO.[1] (R.4)

SANDRA ROSCO reported to the DEPARTMENT OF CHILDRENS' SERVICES ("DEPARTMENT") of the Respondent COUNTY OF LOS ANGELES that GABRIELLA had been sexually molested by her stepbrothers MATT and BILLY WATKINS while she was visiting MICHAEL ROSCO's house.[2] (R.5)

Respondent DAVID WENZEL, a social service worker employed by the DEPARTMENT, investigated these allegations (R.5). Respondents ROBERT CHAFEE and WILLIAM YEO acted as supervisors of WENZEL in this investigation. (R.4)

Based upon this investigation, the DEPARTMENT concluded that MICHAEL ROSCO's parental rights should be limited. The DEPARTMENT therefore filed a petition to limit MICHAEL ROSCO's parental rights on September 9, 1985. (R.5-6)

The petition alleged that the stepbrothers had molested GABRIELLA. Petitioner MICHAEL ROSCO allegedly had permitted the molestation to occur through

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[1] Although SANDRA ROSCO was a defendant in this action, she was not a party to the appeal, and therefore is not a party to the Petition for Writ of Certiorari.

[2] Unless otherwise noted, all references to the records are to the clerk's transcript on appeal.

inadequate supervision of GABRIELLA. The charges in the petition were later dismissed. (R.5-6)

On June 10, 1987, petitioners NELLIE and MICHAEL ROSCO filed their Second Amended Complaint. This Complaint purported to state a cause of action for deprivation of constitutional rights under color of law in violation of 42 U.S.C. § 1983 and various other causes of action not relevant to the Petition for Writ of Certiorari. (R.1-17)

In their complaint, Petitioners alleged that the allegations in the child dependency petition were false. They also allege that the investigation of the actions of MATT and BILLY WATKINS was conducted in a biased fashion, relied upon unreliable information and was a pretext for investigating the conduct of Petitioner MICHAEL ROSCO.

On June 22, 1987, Respondents filed a Demurrer to the Second Amended Complaint (R.18-70). On November 3, 1987, Judge Mariam Vogel sustained the Demurrer. She ruled that prosecutorial immunity barred the cause of action for violation of 42 U.S.C. § 1983. (Reporter's Transcript 1-12)

On January 26, 1989, the Court of Appeal for the State of California, Second Appellate District, affirmed the trial court's sustaining of the Demurrer. The Court of Appeal held that the individual Respondents were absolutely immune from liability for the initiation of child dependency proceedings under the doctrine of prosecutorial immunity. In addition, Petitioners had failed to plead facts showing a municipal custom and policy of violating constitutional rights as required for municipality liability under 42 U.S.C. § 1983.

On March 7, 1989, Petitioners filed a Petition For Review with the California Supreme Court. On April 20, 1989, the California Supreme Court denied review and directed that the Court of Appeal decision not be published pursuant to California Rule of Court 976.

SUMMARY OF ARGUMENT

Petitioners have failed to show any conflict between the State Court of Appeal decision in this action and the Federal Circuit Court decisions interpreting prosecutorial immunity under 42 U.S.C. § 1983. Instead, the State Court of Appeal decision is completely consistent with the applicable Federal Circuit Court decisions. Consequently, petitioners have not shown any grounds for this court to grant Certiorari.

The application of prosecutorial immunity to the filing of a child dependency action by the respondent Social Service workers and to the investigation of child abuse charges pursuant to the preparation of their case does not conflict with any applicable decisions of the Federal Circuit Courts. Federal Circuit Court decisions support the applicability of prosecutorial immunity to investigations performed by prosecutors as part of prosecutorial function of case preparation. Federal Circuit Court decisions concerning social service workers who performed purely investigative functions or police functions unrelated to the filing of a child dependency action simply do not apply to the instant case.

Moreover, assuming that a conflict exists between the Federal Circuit Courts concerning the applicability of

prosecutorial immunity to social service workers who perform police functions, the instant case provides an inappropriate factual context for the resolution of these issues. In the instant case, the social service worker investigated charges of child abuse as part of preparation for the filing of a child dependency action. This case does not raise the issue of the applicability of prosecutorial immunity to police functions such as the removal of children from their homes by social service workers.

Moreover, the Court of Appeal decision is consistent with the functional analysis for the applicability of prosecutorial immunity set forth by this Court. Respondent social service workers performed the prosecutorial function of initiating child dependency actions. The alleged investigative activities of the respondent social service workers were part of the preparation of their case in a child dependency proceeding and therefore were part of their prosecutorial function. The instant case therefore does not involve the performance of nonprosecutorial functions by prosecutorial employees. The Court of Appeal therefore correctly applied the functional analysis set forth by this Court in determining that prosecutorial immunity was applicable.

Moreover, the holding of the Court of Appeal that the allegations of municipal liability under 42 U.S.C. § 1983 were conclusory is entirely consistent with the applicable Federal Circuit Court decisions and does not warrant the granting of Certiorari.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE FEDERAL CIRCUIT COURT CONCERNING THE APPLICABILITY OF PROSECUTORIAL IMMUNITY TO THE INITIATION OF CHILD DEPENDENCY ACTIONS BY SOCIAL SERVICE WORKERS.

Petitioners NELLIE and MICHAEL ROSCO request this court to grant Certiorari on the grounds that the Federal Circuit Court decisions are in conflict concerning the applicability of prosecutorial immunity to the filing and prosecution of child dependency actions by social service workers.

However, Federal Circuit Court decisions actually are in complete accord concerning the applicability of prosecutorial immunity to the bringing of child dependency actions by social service workers and to investigations pursuant to the preparation of the case in dependency proceedings. The Circuit Courts have consistently held prosecutorial immunity to investigations which consist of the organization, marshalling and evaluation of evidence as part of the prosecutorial functions of a social service worker or probation officer charged with the filing of child dependency actions. However, the Circuit Courts have held the immunity to be inapplicable when a social service worker or probation officer performs purely investigative functions and is not responsible for the initiation of child dependency proceedings. Similarly, prosecutorial immunity does not apply when a social service worker performs police functions unrelated to the filing of child dependency actions such as the removal of children from their home.

In *Imbler v. Pachtman* (1976) 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984, this Court held that prosecutors were absolutely immune from liability under 42 U.S.C. § 1983 for the initiation of a prosecution and presentation of the state's case. In a footnote, this Court indicated that prosecutorial immunity also protected at least some aspects of the prosecutor's obtaining reviewing and evaluating of evidence necessary for the preparation of the case.

The Federal Circuit Court decisions which have squarely addressed the issue have consistently held that prosecutorial immunity protects the initiation of child dependency actions by social service workers or probation officers. The Circuit Court decisions applying in prosecutorial immunity include *Coverdell v. Department of Social and Health Services, State of Washington* 834 F.2d 758, (9th Cir., 1987), *Kurzawa v. Mueller* 732 F.2d 1456, 1458, (6th Cir., 1984) *Malachowski v. City of Keene* 787 F.2d 704, 712, *Meyers v. Contra Costa County Department of Social Services* 812 F.2d 1154, 1156, (9th Cir., 1987) and *Salyer v. Patrick*, No. 88-5377 (6th Cir., January 31, 1989).

In *Meyers v. Contra Costa County Department of Social Services* 812 F.2d 1154 (9th Cir., 1987), the court held that social service workers were entitled to absolute immunity for their performance of quasi-prosecutorial functions in connection with the initiation and pursuit of child dependency proceedings. The Court stated:

> "Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise their independent judgment in determining when to bring such proceedings, is *not very different from the responsibility of the criminal prosecutor.* The social

> worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. *The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. We therefore hold that social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings."* (p. 1157)(Emphasis added).

However, consistent with the decisions of other circuit courts declining to apply the immunity to police functions performed by social service workers, the court in *Meyers* did not apply prosecutorial immunity to the decision of the social worker to order a father to stay away from his home prior to the filing of a dependency action.

Numerous Federal Circuit Court decisions have held that prosecutorial immunity protects "the organization, evaluation and marshalling of the evidence" as part of the preparation of the prosecutor's case. Prosecutorial immunity therefore protects investigative activities which are necessary to the preparation of the prosecutor's case and which therefore constitute part of the prosecutorial function. (See, e.g., *Freeman On Behalf Of The Sanctuary v. Hittle* 708 F.2d 442 (9th Cir., 1983), *Ybarra v. Thunderbird Mobile Home Village* 723 F.2d 675, 9th Cir. 1984, *Demery v. Kupperman* 735 F.2d 1139 (9th Cir., 1984) and *Atkins v. Lanning* 556 F.2d 485 (10th Cir., 1977).

The application of prosecutorial immunity to an investigation consisting of the gathering of evidence

required for the initiation of child dependency proceedings by social service workers charged with prosecuting these proceedings therefore is entirely consistent with the interpretation of this immunity by the Federal Circuit Courts.

The Second, Fifth and Tenth Circuit decisions relied upon by Petitioners are not inconsistent with the application of prosecutorial immunity to the initiation of child dependency proceedings in *Meyers v. Contra Costa County Department of Social Services, supra,* and the Court of Appeal decision in *Rosco v. County of Los Angeles.* Instead, these decisions held prosecutorial immunity to be inapplicable to social service workers who performed functions which were purely investigative rather than prosecutorial or social service workers who performed such police functions as the removal of children from their home.

For instance, in *Robison v. Via* 821 F.2d 913 (2nd Cir., 1987), the Second Circuit held that prosecutorial immunity did not protect social service workers from liability for the removal of children from their home. The court did not consider the applicability of prosecutorial immunity to investigations required to gather and marshal evidence for the initiation of a child dependency action.

Similarly, the decisions of the Fifth Circuit in *Austin v. Borel* 830 F.2d 1356 (5th Cir., 1987) and *Hodorowski v. Ray* 844 F.2d 1210 (5th Cir., 1988) do not conflict with the Ninth Circuit interpretation of prosecutorial immunity.

In *Austin v. Borel* 830 F.2d 1356 (5th Cir., 1987), the court declined to apply absolute prosecutorial immunity to child protection welfare workers who performed

purely investigative functions and did not initiate child dependency actions.

In *Austin*, the defendant child protection welfare workers investigated child abuse and reported their findings to the district attorney. They also had the power to obtain a temporary custody order from the local juvenile court by filing a verified complaint. However, unlike the respondent social workers in the instant case, the child protection welfare workers in *Austin did not have the power to initiate child dependency proceedings.*

In *Hodorowski v. Ray*, 844 F.2d 1210 (5th Cir., 1988), the court held that prosecutorial immunity did not protect social service workers from liability for the removal of a child from the home. The court did not address the issue of the applicability of the immunity to an investigation required to gather evidence for the initiation of a child dependency action conducted by social service workers with the responsibility of initiating dependency proceedings.

Moreover, in *Spielman v. Madsen*, No. 87-1098 (10th Cir., May 3, 1989), the court held that prosecutorial immunity did not apply to the removal of a child from their home by a social service worker without proper procedural due process protections. Again, the Tenth Circuit did not consider the applicability of the immunity to investigations by a social service worker pursuant to the preparation of their case in a child dependency action.

Consequently, there is no conflict between the Federal Circuit Court decisions concerning the applicability of prosecutorial immunity to the filing of child dependency actions. The Circuit Courts have consistently

applied prosecutorial immunity where the social service workers initiated child dependency actions. The Circuit Courts have interpreted the immunity to protect investigations necessary for the organization, evaluation and marshalling of evidence in the dependency proceeding.

However, the Circuit Courts have declined to apply the immunity where the social service workers do not perform prosecutorial functions but merely investigate child abuse charges without the ultimate responsibility for initiating dependency proceedings. In addition, the Circuit Courts have declined to apply the immunity to the removal of children from their home prior to the initiation of a child dependency action. Neither of these factual situations is present in the instant case.

The Second, Fifth and Tenth Circuit authorities relied upon by Petitioners simply concern different factual situations from those addressed in the Sixth and Ninth Circuit decisions applying prosecutorial immunity. There is no conflict within the Circuits concerning the applicability of this immunity.

Moreover, the interpretation of prosecutorial immunity by the Court of Appeal in *Rosco* is entirely consistent with the functional analysis of the immunity set forth by this court. The gathering of evidence as part of the initiation of child dependency proceedings by social service workers with the responsibility for prosecuting such proceedings clearly constitutes a prosecutorial function. Under a functional analysis, the immunity clearly protects this gathering of evidence by the prosecution.

2. THERE ARE NO GROUNDS FOR REVIEW OF THE COURT'S DETERMINATION OF THE ISSUE OF MUNICIPAL LIABILITY.

Petitioners also attempt to seek a grant of Certiorari on the grounds that the Court of Appeal incorrectly decided the issue of municipal liability. However, the Court of Appeal decision on this issue is completely consistent with the decisions of this Court and the other Federal Circuit Courts.

In *Rosco,* the Court of Appeal merely applied the well-settled principles of law that municipalities may only be held liable under Section 1983 for a municipal custom or policy and that civil rights complaints must allege facts rather than mere conclusions.

In *Monell v. New York City Department of Social Services* (1977) 46 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, this Court held that municipalities may be held liable under 42 U.S.C. § 1983 only if a municipal custom or policy violated the plaintiff's constitutional rights.

In *Koch v. Yunich* 533 F.2d 80 (2d Cir., 1976), the Second Circuit upheld the dismissal of the complaint alleging violations of 42 U.S.C. § 1983 on the grounds that its allegations were conclusory.

In their cause of action for municipal liability, Petitioners merely allege that the County permitted its employees to violate constitutional rights in conclusory terms. Petitioners therefore did not allege any facts establishing a custom or policy of the County to conduct child abuse investigations which violated constitutional rights as required from municipal liability under *Monell.*

In its decision in *Rosco v. County of Los Angeles,* the Court of Appeal merely applied these well-settled principles of law to the conclusory allegations of plaintiff's complaint. Consequently, the Court of Appeal did not make any determination of the issue of municipal liability which is inconsistent with Federal Circuit Court decisions or the decisions of this Court. Consequently, it would be inappropriate for this court to grant Certiorari on this ground.

Petitioners also contend that this Court should grant Certiorari and remand the case with instructions to the Court of Appeal to review its decision concerning municipal liability in the light of the recent decision in *City of Canton v. Harris,* No. 86-1088 (February 28, 1989). However, Petitioners have not alleged that the failure of Respondent COUNTY OF LOS ANGELES to train its employees rose to the level of a "deliberate indifference" to the rights of its inhabitants required for municipal liability under *City of Canton v. Harris.*

In *City of Canton,* this Court held that a municipality's failure to train its employees could establish a custom or policy of violating constitutional rights under § 1983 only if the failure to train rose to the level of a "deliberate indifference" to the rights of the municipality's inhabitants.

The court stated:

> "We hold today that inadequacy of police training may serve as the basis for Section 1983 liability *only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact* . . . Only where

> failure to train reflects an 'deliberate' or 'conscious' choice by the municipality – 'policy' is defined by our prior cases – can a city be liable for such a failure under Section 1983."

The "deliberate indifference" standard set forth in *City of Canton* would not have altered the Court of Appeal's finding that the alleged inadequate training did not rise to the level of custom or policy which violated Petitioner's constitutional rights. The conclusory allegations concerning inadequate training and Petitioners' complaint do not allege any fact showing that this training amounted to a "deliberate indifference" to the constitutional rights of inhabitants of the COUNTY OF LOS ANGELES. Instead, the complaint merely alleged inadequate training in conclusory terms.

Moreover, the numerous procedural safeguards for the constitutional rights of the parties and child dependency proceedings under California law prevent Petitioners from ever establishing a "deliberate indifference to the rights of inhabitants" based upon the alleged inadequate training of social service workers in the investigation of child abuse charges when the only harm caused by the investigation is the filing of a child dependency action.

Under California law, child dependency actions contain numerous procedural safeguards for the constitutional rights of both parent and child other than the training of the social service worker employed to investigate child abuse charges and bring dependency actions. Child dependency proceedings are heard by an impartial hearing officer. These actions also contain such procedural safeguards as the right to counsel and standards

for the admissibility of evidence identical to those civil actions. California Welfare & Institutions Code §§ 349 and 355.

These procedural protections are likely to protect the constitutional rights of the parties in a child dependency action even if the initial investigation is conducted by inadequately trained social service workers. The alleged failure to train social service workers in investigation therefore can never rise to the level of a "deliberate indifference" to constitutional rights under *City of Canton*.

The allegations of inadequate training therefore do not show the "deliberate indifference" to the rights of inhabitants necessary for municipal liability based upon failure to train under *City of Canton v. Harris*.

3. A GRANT OF CERTIORARI WOULD BE INAPPROPRIATE IN THE PRESENT CASE.

Moreover, a grant of Certiorari is simply inappropriate in the present case. In view of the California Supreme Court's decision not to certify the Court of Appeal's decision for publication, the Court of Appeal decision does not have any stare decisis effect under California law. In view of its lack of any precedential value, the case does not raise sufficiently important issues to warrant review by Writ of Certiorari.

California Rule of Court 977 provides in pertinent part that an opinion that is not ordered published shall not be cited or relied on by a court or party in any other action or proceeding. In its denial of the Petition For

Review, the California Supreme Court directed the reporter of decisions not to publish the Court of Appeal decision in *Rosco v. County of Los Angeles*.

This opinion in *Rosco v. County of Los Angeles* does not have any stare decisis effect. Any possible conflict between the *Rosco* decision and Federal Circuit Court decisions is simply not important enough to warrant the granting of certiorari.

Moreover, the instant case does not provide an appropriate factual context for the resolution of any conflicts within the Federal Circuit Courts concerning the applicability of prosecutorial immunity. Any potential conflict between the Federal Circuit Courts concerns the applicability of the immunity to the removal of children from their homes by social service workers. The instant case does not raise this issue. Instead, the instant case solely concerns the applicability of prosecutorial immunity to the filing of a child dependency action by social service workers and to investigations necessary for the preparation of the case in a dependency proceeding.

CONCLUSION

There is no conflict between the Federal Circuit Court decisions concerning the applicability of prosecutorial immunity to the filing of child dependency actions by social service workers. The decisions which squarely address this issue uniformly hold that prosecutorial immunity protect social service workers for the initiation and pursuit of child dependency proceedings. The immunity also protects investigations which are part of the

preparation of the prosecutor's case in child dependency actions.

The Federal Circuit Court decisions relied upon by Petitioners do not conflict with those Circuit Court decisions applying prosecutorial immunity. Instead, these decisions simply decline to extend prosecutorial immunity to social service workers performing purely investigative rather than prosecutorial functions or to police functions such as the removal of children from their home. However, the gathering of evidence as part of the preparation of the case by social service workers who initiate child dependency actions clearly constitutes a prosecutorial function protected by the immunity under the applicable Federal Circuit Court decisions.

Moreover, the granting of a Petition for Writ of Certiorari is inappropriate in view of the lack of any stare decisis effect of the Court of Appeal decision in *Rosco v. County of Los Angeles*.

The ruling of the Court of Appeal on the conclusory allegations concerning municipal liability is consistent with the applicable Federal Circuit Court decisions and the rulings of this Court. Petitioners have not alleged the "deliberate indifference" required for a cause of action for municipal liability based upon failure to train. Moreover, in view of the numerous procedural safeguards which California law imposes in order to protect constitutional rights in child dependency actions, the alleged failure to train social service workers cannot establish "deliberate indifference" to the rights of inhabitants as required for municipal liability.

In addition, any conflicts concerning the scope of prosecutorial immunity existing in the Federal Circuit Court decisions involve issues not raised in this action.

Based upon the foregoing, the Court should not grant Certiorari in this action.

DATED: September 18, 1989

Respectfully submitted,

WASSERMAN, COMDEN & CASSELMAN

DAVID B. CASSELMAN
Attorneys for Respondents